Malaysian provision) to set aside, on the ground of fraud, the registration in this country of the judgment of a foreign Court, the fraud to be established must be a fraud on the foreign Court pronouncing the judgment.

I uphold the respondent's contention that the guarantee if true being in blank is nowhere near to allegation of fraud. If blank it is an unlimited guarantee. Respondent cited the case of *New Zealand Loan And Mercantile Agency Company v. Paterson And McLeod* [1882] 1 CA page 325 where a guarantee "to be answerable for the amount of C's present and future liabilities to you, not exceeding in the whole the sum of £ _, to be payable within _ days after demand" is a good and valid guarantee, binding upon the guarantor without any limit as to amount.

I find merit in the respondent's Counsel's argument that the appellant took full advantage of the proceedings in Singapore before the judgment in Singapore was obtained. There is therefore no fraud of the Singapore Court. I therefore dismiss this appeal with cost to the respondent.

BEN FOODS (EAST MALAYSIA) SDN. BHD.

v.

KUCHING HOTELS SDN. BHD.

HIGH COURT, KUCHING
DATUK CHONG SIEW FAI J.
[SUIT NO. KG. 199 OF 1987]
19 JUNE 1993

PRACTICE & PROCEDURE: Application for striking out counterclaim - Whether claim disclosed no reasonable cause of action - Whether claim frivolous and vexatious and an abuse of the process of Court.

This was an appeal by the plaintiff against the decision of the Deputy Registrar dismissing its application to strike out paragraph 14 of the amended counterclaim of the defendant.

The facts were that pursuant to a tenancy agreement the plaintiff entered into possession of the premises belonging to the defendant and paid the defendant a sum of RM 474,300. The plaintiff however vacated the premises before the agreed term of tenancy expired and subsequently claimed back from the defendant RM355,725.

The defendant, while contesting the claim, filed a counterclaim for the damage caused by the plaintiff's premature vacation thereof and applied before Datuk Tan Chiew Thong J. for summary judgment in respect of the same. The application was dismissed and in so far as relating to paragraph 14 of the counterclaim, the learned Judge ruled that the issues could not be resolved on conflicting affidavits and should go to trial. By the said paragraph 14, the defendant in effect alleged suffering of loss and damage caused to its premises resulting from the plaintiff's occupation, with the particulars of the loss and damage listed therein.

The plaintiff then applied to the Deputy Registrar to strike out paragraph 14 on the grounds that it disclosed no reasonable cause of action and that it was vexatious and frivolous and an abuse of the process of Court. The Deputy Registrar dismissed the application saying that the issues raised had already been decided by the learned Judge and therefore it was an abuse of the process of Court for the plaintiff to relitigate the same. The plaintiff hence appealed.

Held:

[1] It is settled law that a claim in an action will not be struck out for disclosing no reason-

able cause of action if it discloses some cause of action however weak, or some question fit to be decided by the Court. Likewise, in the context of the present appeal, to justify the striking out of paragraph 14 as being vexatious or frivolous, the paragraph must be shown to be obviously vexatious and obviously frivolous or obviously unsustainable. As regards the expression "abuse of the process of the Court", to warrant the striking out of paragraph 14, the paragraph must be shown to have been framed in such a way as to disclose that the processes of the Court are not being used *bona fide* and properly.

[2] The affidavit evidence of the parties contain conflicting allegations and controversial contentions. Having regard to the pleadings, the evidence adduced and the facts and circumstances of the case, and applying the applicable principles of law, whatever is the strength of the defendant's case, the matters raised in paragraph 14 herein cannot be said to disclose no reasonable cause of action, or are frivolous or vexatious or constituting an abuse of the process of the Court.

[Appeal dismissed].

Casas referred to:
Re Rolls Razor Ltd. (No. 2) [1969] 3 AER 1386 ***(cit)***
CM Van Stillevoldt BV v. EI Carriers Inc [1982] 126 So1. Jo1. 857 ***(cit)***
Davey v. Bentinck [1893] 1 QB 185 ***(cit)***
Wenlock v. Moloney [1965] 1 WLR 1238 ***(cit)***
Drummond - Jackson v. BMA [1970] 1 WLR 688 ***(cit)***
Att.-Gen. of Duchy of Lancaster v. L. & N. W. Rly [1893] 3 Ch. 274 @ 277 ***(cit)***
Young v. Holloway [1895] 87 ***(cit)***
Ashmore v. British Coal Corporation [1990] 2 AER 981 ***(refd)***

Other sources referred to:
Mallal's Supreme Court Practice, Vol. 1, p. 680

For the plaintiff - P. O. Chew (David Toh with him); M/s. Chew, Jugah Wan Ullok & Co.
For the defendant - Chundang Jegang; M/s. Goh & Partners

JUDGMENT

Chong Siew Fai J:
This is an appeal by the plaintiff against that part of the decision of the learned Deputy Registrar i.e. refusing to strike out paragraph 14 of the defendant's amended defence and amended counterclaim.

It must be pointed out at the outset that the plaintiff's application by way of summons in chambers dated 28 July 1992 did not properly describe and identify the impugned pleading which was termed as "defendant's counterclaim". However, in paragraph 2 of Lim Kuan Yew's affidavit made on 28 July 1992, the document was described as "the amended counterclaim of the defendant dated 7 August 1987". Even that wrongly identified the pleading. The pleading dated 7 August 1987 had in fact been superseded by a later "amended defence and amended counterclaim" dated 7 July 1988. This lastly mentioned document should have been the pleading forming the subject matter of the plaintiff's said summons dated 28 July 1992. The impropriety seemed to have escaped the notice or attention of the parties at the initial hearings. However, since the two paragraphs no. 14 in the two pleadings termed as "amended defence and amended counterclaim" dated 7 August 1987 and 7 July 1988 are identical, no prejudice has been caused to either party by reason of the wrong identification. And I would treat the application before the learned Deputy Registrar and this appeal before me as relating to the defendant's amended defence and amended counterclaim dated 7 July 1988.

There had been an earlier application before Datuk Tan Chiew Thong J. taken out by the defendant seeking, *inter alia*, summary judgment on its counterclaim under O. 14. In so far as relating to paragraph 14 of the amended defence and amended counterclaim, the learned Judge ruled that the issues could not be resolved on conflicting affidavits and should go to trial.

In dismissing the plaintiff's application pesently under appeal, the learned Deputy Registrar, without deciding on the issue of *res judicata* which was raised, said "that substantially the same points raised now have been decided upon by the learned Judge" and that it was an abuse of the process of Court for the plaintiff to seek to relitigate the issue". She accordingly dismissed the application.

Much was said about the decision of the learned Deputy Registrar. However, I need only point out that an appeal from the decision of the Registrar or her deputy is by way of a rehearing. A Judge hearing such an appeal is in no way fettered by the decision appealed against e. g. it is **not** that he would only interfere if he is satisfied that the Registrar or her deputy had exercised her discretion wrongly. Of course, where appropriate, due weight must be given to the decision of the Registrar or her deputy. See **Mallal's Supreme Court Practice** Vol. 1

p. 680; *Re Rolls Razor Ltd. (No. 2)* [1969] 3 AER 1386 @ 1399; *CM Van Stillevoldt BV v. El Carriers Inc* [1982] 126 Sol. Jol. 857.

The plaintiff's claim in the action was for RM355,725 being the balance of the sum RM474,300 paid to the defendant under an agreement described as "Tenancy Agreement" under which the palintiff entered into possession of the premises belonging to the defendant and paid the said sum RM474,300. Before the expiration of the agreed term, the plaintiff vacated the premises and claimed the amount RM355,725. Though, strictly, not relevant for our present purpose, I would mention that subsequently, summary judgment under O. 14 was entered for the plaintiff in the sum claimed i. e. RM355,725.

Paragraph 14 of the amended defence and amended counterclaim (hereinafter referred to as paragraph 14 of the amended counterclaim) reads:

14. The plaintiff caused serious damage to the defendant's demised premises during its occupation of the same and/or while in the process of moving out upon their wrongful termination of the said agreement. The defendant has incurred expenditure in remedying the serious damage caused by the plaintiff. The defendant has therefore suffered loss and damage.

Particulars Of Loss And Damage

(1)	Re-wiring of damaged electrical wires, supplying and installing of damaged lighting points, switch sockets, and other points and sockets, making good all loosened conduits, trunking and cover, and testing and recommissoning the whole electrical system;	RM21,534.00
(2)	To make good the damaged terrazo floor, making good the damaged copper piping for chiller, hot water piping and cold water piping and making good the water system. Fixing the floor traps at all drain pipes. Making good all the walls and painting the walls;	RM 6,250.00
(3)	Repairing damaged ceiling of the demised premises; and	RM 4,950.00
(4)	General cleaning up of the demised premises.	RM 1,976.25
		RM34,710.25

It is this paragraph 14 that the present appeal is about.

The plaintiff filed a defence to counterclaim dated 21 February 1992. While paragraph 2 thereof is a specific denial of the defendant's said paragraph 14, paragraphs 3 and 4 also seem to bear some relation to the said paragraph 14. Paragraphs 2, 3 (Particulars (i) to (v) thereof omitted) and 4 of the plaintiff's "defence to counterclaim" read:

2. The plaintiff denies paragraph 14 of the amended counterclaim and each and every of the particulars of loss and damages totalling RM34,710.25 thereunder.

3. The plaintiff avers that the demised premises were rented as an empty shell and was extensively fitted and renovated by the plaintiff for its operations therein as a supermarket.

Particulars

(i) ...

(ii) ...

(iii) ...

(iv) ...

(v) ...

(vi) The claim for cleaning up the demised premises at RM1,976.25 is not sustainable in law as the demised premises was subject to normal wear and tear only.

4. The plaintiff will further aver that it paid RM70,589.30 for additional cost of builders work and RM11,263. for additional cost of M & E services in respect of the demised premises. These payments were billed to the plaintiff by the defendant and the plaintiff will refer to the details and itemised breakdown supplied by the defendant, its contractors and consultants, at trial for its effect and purport.

It may be noted that while paragraph 2 is a direct denial of paragraph 14 of the amended counterclaim, paragraphs 3 and 4, in brief, pleaded that the premises were rented as an empty shell and enumerated the renovations and services on the premises respecting which the costs were alleged to have been paid by the plaintiff.

Of particular significance, however, is item (vi) of the Particulars contained in the said paragraph 3. This item (vi) is in answer to item (4) of the Particulars in paragraph 14 of the amended counterclaim, and , from the point of view of

pleading, puts the defendant's claim of the said item (4) in issue.

One important point not to be lost sight of is that the plaintiff's application for striking out paragraph 14 of the amended counterclaim is based on the grounds that:

(1) it discloses no reasonable cause of action against the plaintiff;
(2) it is frivolous and vexatious;
(3) it is an abuse of the proceses of the Court.

The inherent jurisdiction of the Court is also relied on.

A claim or, for that matter, a counterclaim in an action will not be struck out under ground (1) above (i.e. disclosing no reasonable cause of action) if it discloses some cause of action, however weak, or some question fit to be decided by the Court. *Davey v. Bentinck* [1893] 1 QB 185. The word "reasonable" means arguable. A case may be weak and is demonstrably unlikely to succeed; but that is not enough to justify striking out if the cause has some chance of success on consideration of the pleadings. *Wenlock v. Moloney* [1965] 1 WLR 1238; *Drummond - Jackson v. BMA* [1970] 1 WLR 688. In the context of the present appeal, to justify the striking out of paragraph 14 of the amended counterclaim as being "frivolous or vexatious", the paragraph must be shown to be obviously frivolous or vexatious or obviously unsustainable. *Att.-Gen. of Duchy of Lancaster v. L. & N. W. Rly* [1893] 3 Ch. 274 @ 277. It must be "so clearly frivolous that to put it forward would be an abuse of the process of the Court". *Young v. Holloway* [1895] P.87 @ 90. Indeed in the recent case of *Ashmore v. British Coal Corporation* [1990] 2 AER 981, the English Court of Appeal approving *E.T. Mailen Ltd v. Robertson* [1974] 1 CR 72 accepted the expression "frivolous or vexatious" to include proceedings which are an abuse of the process. As regards the expression "abuse of the process of the Court" to warrant the striking out of the said paragraph 14, the paragraph must be shown to have been framed in such a way as to disclose that the processes of the Court are not being used bona fide and properly.

From the plaintiff's summons it appears that the resort to the inherent jurisdiction of the Court is also rested on grounds (1), (2) and (3) stated above. In any event I would examine all the relevant facts and circumstances to see if the inherent jurisdiction ought to be exercised.

Now, in paragraph 14 of the amended counterclaim, the defendant alleges suffering of loss and damage caused to its premises resulting from the plaintiff's occupation of and quitting from the premises with particulars of the loss and damage listed. The plaintiff denies that and alleges that the premises were rented as an empty shell and that the plaintiff itself did the renovations at its own expense (see paragraphs 2, 3 and 4 of the "defence to counterclaim"). More particularly, the plaintiff alleges that the defendant's claim of RM1,976.25 is unsustainable in law as the premises were subject to normal wear and tear (the said paragraph 3 Particulars (vi)).

The affidavit evidence of the parties contain conflicting allegations and controversial contentions. For example, the plaintiff alleges that the defendant's claim of cost for rectifying the fittings and improvements effected by the plaintiff on the premises was misconceived frivolous and vexatious. Reference was made to the "Tenancy Agreement". The defendant, on the other hand, contends that the question was whether the plaintiff had made good or reinstated the premises by repairing the damage before handing over the premises to the defendant, and that the defendant's claim is for expenses incurred in making good the damage caused by the plaintiff on the premises at the time of handing over. The defendant alleges that the premises at the time of handing over were in a deplorable condition and that the "general mess" left behind was beyond "fair wear and tear". Is the damage as alleged by the defendant or any part thereof answerable by the plaintiff existing and recoverable in the light of the relevant provisions of the "Tenancy Agreement" and the general law of tenancy, which themselves need be considered as to their applicability? If so, to what extent? Whatever the strength of the defendant's case, these are matters that cannot be said to constitute no reasonable cause of action or are frivolous or vexatious or contituting an abuse of the process of the Court.

As regards the passage in the Judgment of Datuk Tan Chiaw Thong J., it is true that the Judgment was on an application of a different nature. On the other hand, the passage relied on cannot be said to be warranting totally no consideration on the question of whether the claim in the said paragraph 14 discloses any reasonable cause of action. In any event, I do not find it necessary to relay on the passage. Having

regard to the pleadings, the evidence adduced and the facts and circumstance of the case, and applying the principles of law stated above, the said paragraph 14 of the amended counterclaim cannot, in my view, be said to disclose no reasonable cause of action or is frivolous and vexatious or is an abuse of the process of the Court. Nor ought the inherent jurisdiction of the Court be exercised to strike it out as sought.

I wish to make clear that in coming to the above conclusion, no consideration has been given to paragraph 14.5 of Encik Chundang's written submission which, or a substantial part of it, was not based on any pleading or evidence and should not, therefore, have been adduced.

For the plaintiff, it was contended that though the plaintiff's application for striking out paragraph 14 of the amended counterclaim was dismissed by the learned Deputy Registrar, costs of application should not have been wholly awarded against the plaintiff since the plaintiff had succeeded in striking out paragraph 15 of the defendant's amended defence and amended counterclaim. With respect, I am unable to agree. About 2 months prior to the hearing before the Deputy Register, the defendant had indicated that it would abandon the said paragraph 15 (see paragraph 9 of Ong Seh Bee's affidavit affirmed on 3 September 1992). The plaintiff could have accepted that and dropped the remaining relief thereby shortening the hearing. As it turned out, the proceedings on the actual hearing of the application in November 1992 were substantially on the striking out of the said paragraph 14. This is borne out in the written submissions of Counsel for the parties and the ruling appealed against. Accordingly the award of cost to the defendant by the learned Deputy Registrar cannot be said to be unjustified.

For the reasons given above, the appeal is dismissed with cost to be taxed, if not agreed, and paid by the appellant/plaintiff to the respondent/defendant. The award of cost by the learned Deputy Registrar on 17 December 1992 is affirmed.

CONFIDENCE CONCRETE SDN. BHD.

v.

SHIMIZU-PEREMBA SDN. BHD.

HIGH COURT, KUCHING
DATO' HJ ABDUL KADIR SULAIMAN J.
[SUIT NO. KG. 26 OF 1990]
27 DECEMBER 1993

PRACTICE & PROCEDURE: Application to dismiss suit for want of prosecution - Principles applicable - Summons for directions taken out - Order to set down for trial - Failure to give notice of trial - Failure to set down for trial within the prescribed time - Whether mandatory - Lapse of more than 4 years from date of order to set down suit for trial - Whether inordinate and inexcusable delay - Whether delay intentional and contumelious - Whether defendant prejudiced - No action taken by defendant on their counterclaim - Whether delay by defendant in pursuing their counterclaim precludes the Court from hearing this application - Whether the defendant's counterclaim can be dismissed without formal application by the plaintiff - Whether the power of the Court to dismiss an action for want of prosecution ought to be exercised where the delay does not extend beyond the limitation period for the cause of action - Consideration of O. 25 r. 1(4), O. 34 rr. 2(2), 7, 7A(2), 8(1) Rules of the High Court 1980.

TORT: Professional negligence - Negligence of plaintiff's solicitor and solicitor's assistant - Whether plaintiff responsible for negligence of their solicitors.

The defendants filed an application on 17 July 1993 to dismiss the plaintiffs' action for want of prosecution pursuant to O. 25 r. 1(4), O. 34 r. 8(1) of the Rules of the High Court 1980 (RHC) and under the inherent jurisdiction of the Court.

The application arose from a writ of summons No. S5-23-7-88 instituted by the plaintiffs in the civil division of the High Court at Kuala Lumpur for alleged breach of contract for the supply of batching concrete by the plaintiffs as sub-contractor to the defendants who were the main contractors. It was alleged in the statement of claim that the defendants had terminated the said contract by a letter dated 7 April 1987 for which the plaintiffs claimed special damages of RM258,662.14, general damages, interest and other relief. The writ was issued on 7 January 1988 and the defendants filed their defence and counterclaim on 21 June 1988. Records indicated that the plaintiffs filed their reply and defence to counterclaim on 12 May 1988 i.e.